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IN THE

Supreme Court of the United States

October Term, [redacted] 1961

No. [redacted] 45

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
CBS TELEVISION, J. L. VAN VOLKENBURG,
and H. K. AKERBERG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 690.

LOU POLLER,

Petitioner,

v.

COLUMBIA BROADCASTING SYSTEM, INC., CBS TELEVISION, J. L. VAN VOLKENBURG, AND H. K. AKERBERG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 282-86) is reported at 174 F. Supp. 802. The opinion of the Court of Appeals (R. 290-307) is reported at 284 F. 2d 599.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 10, 1960. The Petition for Certiorari was filed February 1, 1961, and was granted on March 20, 1961: 365 U. S. 840 (1961). The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646(1), 62 Stat. 928(1), 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The statutory provisions involved are Sections 1, 2 and 7 of the Sherman Act, Act of July 2, 1890, c. 647, §§ 1, 2 and 7, 26 Stat. 209, 15 U. S. C. §§ 1, 2 and 7; and Section 4 of the Clayton Act, Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U. S. C. § 15. They are printed in Appendix A (*Infra*, p. 39).

QUESTIONS PRESENTED.

1. Where a national TV network purchased the UHF station of a competitor of its affiliate and then cancelled the affiliation and bought the affiliate's equipment, so that the network became the sole owner and operator of UHF in the area and thus excluded all other entrants into UHF in the area, is it proper to ignore all the evidence of the network's monopoly, attempted monopolization and conspiracy, on the ground that it had the contractual "right" to cancel the affiliation and the inherent "right" to purchase a station and therefore the admitted injury to petitioner was *damnum absque injuria*?

2. Is contributory negligence a defense to the Sherman Act; i.e., should the victim be denied redress because he had prospered and expanded his station with knowledge that the monopolist exercising its contract "right" might cancel the affiliation and eliminate him?

3. May a network, which produces and sells programs to stations, also own and operate stations, and is this vertical integration equivalent to the benign selection by a trader of the customer with whom he will deal?

4. Can an unincorporated subsidiary be a party to a conspiracy in restraint of trade, where it operates precisely like an incorporated subsidiary?

5. May summary judgment be granted against a plaintiff despite genuine issues of fact, because the court chooses to accept the evidence of the defendants and ignore the testimony in contradiction of it?

STATEMENT OF THE CASE.

This is a treble damage suit charging violations of Sections 1 and 2 of the Sherman Act.

Petitioner is the assignee of Midwest Broadcasting Company ("Midwest"), a corporation which owned and until February 25, 1955, operated a UHF (ultra high frequency) television broadcasting station (WCAN-TV) in Milwaukee, Wisconsin (R. 6, 235).

After a long freeze on the issuance of licenses for new stations, the Federal Communications Commission (FCC) in June 1952 made additional channels in the UHF band available for television. Midwest then obtained a permit for a UHF station in Milwaukee and on August 21, 1953, signed an affiliation agreement with CBS-TV for two years. CBS-TV reserved the unilateral right to terminate the affiliation at any time on six months' notice (R. 15, 59).

In December 1953 the FCC gave notice of a proposed rule that would permit the ownership by a single licensee of 7 television stations not more than 5 of which could be VHF (very high frequency) stations (R. 50).

There were then two other television stations in the Milwaukee market in addition to petitioner's station. One was a VHF station, affiliated with NBC and ABC (R. 238). The other, WOKY-TV, owned by Bartell Broadcasters, Inc., was a UHF station with no primary affiliation (R. 16).

By this time petitioner's station, WCAN-TV, was operating profitably, and was praised by CBS-TV as an outstanding example in the country of a successful UHF operation (R. 15, 241).

As a result of his success petitioner had embarked on an extensive expansion program of which he kept CBS fully informed. He acquired new and improved equipment for his station and was building a new studio (R. 18, 242). Storer Broadcasting Co. had manifested an interest in acquiring petitioner's station for $2,000,000 if the pro-

posed FCC rule was adopted, and petitioner had indicated his willingness to sell (R. 17, 239).

In July 1954 the CBS respondents, in anticipation of the new FCC rule, determined to acquire for themselves an option to buy a UHF station in Milwaukee (R. 19, 32). They therefore engaged the services of defendant Thad Holt (R. 19, 50). On July 26, 1954, Holt met with CBS representatives in New York, and from there went directly to Milwaukee (R. 91). Three days later, without disclosing CBS' interest in the transaction, Holt secured from Bartell an option in his own name to purchase station WOKY-TV (R. 91). Neither Holt nor CBS ever approached petitioner regarding the purchase of his station, although CBS knew of petitioner's discussions with Storer and had tried to dampen Storer's interest in petitioner's station by refusing to give assurance that the CBS affiliation would be continued (R. 163-65, 178-79).

On September 17, 1954, the FCC adopted its proposed rule, effective October 22, 1954 (R. 17, 104). Late on October 21, 1954, a few hours before the rule became effective, CBS-TV telegraphed petitioner that his affiliation was cancelled (R. 20, 50).

Petitioner immediately flew to New York and pleaded with the officials of CBS for an explanation and reconsideration of their cancellation of his affiliation (R. 50, 223-24). As a result of this meeting an agreement was entered into whereby CBS acquired the physical assets of petitioner's station and an assignment of his studio leases and transmitter site, in exchange for $500,000 and the physical equipment CBS was acquiring from Bartell. The agreement contained a recital that petitioner would continue to operate a television station in Milwaukee (R. 51, 61). This was made a condition of the deal by CBS although both parties knew the improbability that Poller could continue operations (R. 21) and he himself considered the statement nothing more than "window dressing" (R. 105-6).

On October 25, 1954, Holt assigned his option to CBS and CBS immediately exercised it (R. 20, 92).[1]

On February 17, 1955, CBS-TV commenced operation in Milwaukee under the call letters WXIX-TV; and by February 27 petitioner ceased broadcasting. CBS, the producer of national TV programs, thereupon became the sole UHF station owner and operator in the Milwaukee area (R. 6, 21-22, 235).

In September, 1956, petitioner brought the present action on the ground that the events in Milwaukee constituted a conspiracy to eliminate the only two UHF stations in Milwaukee,—petitioner's and Bartell's, and at the same time to coerce petitioner to sell out to CBS at a distress price through cancellation of the CBS affiliation, with the result that CBS would become the sole UHF broadcaster in the Milwaukee market. Petitioner further claimed that respondents' conduct constituted monopolization and an attempt to monopolize.

Damages are claimed in the amount of $1,450,000 and the trebled amount of $4,350,000. This represents the difference between the actual value of petitioner's equipment and facilities (at least $2,000,000) and the amount at which CBS acquired it ($500,000 in cash and used equipment of WOKY-TV worth no more than $50,000) (R. 23, 226).

The District Court, Holtzoff, J., granted summary judgment against petitioner on the ground that assuming that the Sherman Act had been violated and a conspiracy had been shown, nevertheless, petitioner's admitted injuries were *damnum absque injuria* because CBS had simply exercised a contractual right to cancel petitioner's

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1. The FCC approved CBS' acquisition of station WOKY-TV by the narrow division of three to two, with a strong dissent by Commissioners Hennock and Bartley that this transfer would not serve the "public interest, convenience and necessity". 11 *Pike & Fischer, Radio Regulation* 913. One of the affirming Commissioners was Lee to whom Dr. Stanton had previously spoken, *ex parte*, concerning CBS' acquisition of a UHF station in Milwaukee (R. 173-76).

affiliation and a legal right to choose to buy a station, albeit a rival station which CBS-TV now would operate as a self-affiliate (R. 282).

The Court of Appeals (Judges Prettyman and Washington) heard argument on February 5, 1960, and on its own motion, reargument on May 23, 1960, before Wilbur K. Miller, C. J., Prettyman and Washington, JJ. On November 10, 1960, the Court of Appeals affirmed the judgment of the District Court in an opinion by Chief Judge Miller (R. 290). A vigorous dissent was filed by Judge Washington (R. 301).

SUMMARY OF ARGUMENT.

1. Concentration of control is much more pronounced in the television industry than it was in the motion picture industry before *United States v. Paramount Pictures*, 334 U. S. 131 (1948). The three national networks dominate the industry. The demand for nationwide television advertising so far exceeds the available facilities that the networks are assured of continued co-existence. Since each network uses only one local outlet for its programs, and in the vast majority of significant markets there are more than two stations, CBS is assured an outlet for its programs without competing with the other networks.

By the coercive power of its programming CBS has accumulated a chain of affiliated stations, each of which is bound to it by a standard affiliation contract, although the network is free to cancel the affiliation at its pleasure. Each station is thus made an "exclusive dealer" whose continued existence is dependent on his supplier; if his affiliation or "dealership" is cancelled, the network product, without which he cannot compete and for which there is no substitute, is taken from him. CBS' control is tightened by "must buy" and "option time" requirements which are fastened on its advertisers and affiliates, respectively.

The FCC has permitted CBS to own and operate stations. This arms CBS with monopolistic power to acquire the station of any of its affiliates at its own price because of the inherent threat that otherwise the network will cancel the affiliation. The number of stations which the network may own and operate is limited; but the existence of the power to own stations is a potential threat against all affiliates. CBS itself admits the extraordinary extent of this power by claiming that it will never negotiate with an affiliate on the price of his station for fear that it may be accused of grinding down his price by the threatened cancellation of his affiliation.

2. CBS admits that the television industry is "bursting at the seams" because the VHF channels are not enough to meet the demand. UHF concededly is the only source for expansion and potential competition in the television industry.

Poller was outstandingly successful with UHF in Milwaukee, and an extraordinary proportion of the television sets in Milwaukee had been converted to receive UHF. CBS praised his skill and enterprise.

CBS entered the Milwaukee market, where Poller, its affiliate, was highly successful, and wiped him out. By giving Poller notice of the cancellation of his affiliation after obtaining an option to buy Bartell, CBS forced Poller to turn his equipment over to CBS at its price, far less than it knew he otherwise could have obtained for his going, successful station. In the one combined act CBS thus killed off both UHF operators and emerged as the sole UHF owner and operator in Milwaukee.

3. CBS' use of its network power to eliminate both UHF operators in Milwaukee and to emerge as the sole owner and operator of UHF there restrained competition in violation of Section 1 of the Sherman Act. It is no excuse that in its contract with Poller it gave itself the right to cancel his affiliation. The notice of cancellation was part of its plan to force his sale to CBS at a distress price. The inference is clear that CBS expected him to plead for pity when he received the notice, and all that followed was what CBS must have planned. Principles governing customer selection are inapplicable here because CBS, a wholesaler of programs, itself used the leverage of its network power to enter the retail field. This is especially so where, as here, it eliminated the only independent UHF operators and reduced the number of UHF stations from two to one. In addition to destroying Poller and becoming the sole UHF operator in Milwaukee, CBS seriously discouraged any other independents from pioneering with UHF in Milwaukee or elsewhere in the country.

4. CBS' acquisition of a station in the Milwaukee market by itself constitutes an unreasonable restraint of trade, which directly injured Poller. The acquisition eliminated all local competition for the CBS product. It also resulted in the removal of all future affiliation possibilities in Milwaukee. In addition, CBS' ownership of a station inevitably suppressed competition because it was incompatible with national spot advertising, it increased CBS' leverage power over national advertisers, and automatically removed the formerly independent station from any possible competition by the other networks for its facilities.

Vertical integration is especially objectionable in TV, probably the most important medium of mass communications. Control of the airwaves should be in as many independent hands as possible.

5. The conspiracy which has been shown does not fail for want of parties capable of conspiring. CBS' economically independent division, CBS-TV, is a party capable of conspiring with its parent, CBS, Inc. It is treated by CBS in exactly the same manner as its incorporated subsidiaries. Bartell furthered the conspiracy after learning of its existence. Holt, an independent businessman, was one of the main actors in consummating the plan and had an independent financial interest in it.

6. CBS' conduct in Milwaukee violates Section 2 of the Sherman Act. Once CBS had purchased Bartell's station it had absolute power, by its ability to lower advertising rates and operate its Milwaukee station at a loss, to exclude other independent UHF operators from Milwaukee. The other networks, by virtue of their preferred VHF affiliations in Milwaukee, would not affiliate with any independent UHF stations.

7. The court below on summary judgment chose to accept CBS' explanation of the facts. It concluded that CBS did not negotiate with Poller because it considered his price out of line, despite CBS' own testimony which justi-

fied the conclusion that its refusal to negotiate was the result of its plan to "grind down" the affiliate's price by buying across the street. It concluded that Poller sought the sale to CBS because he flew to New York, and it refused to consider the fact that Holler was irresistibly coerced to do so. It concluded that Poller's expansion of his station was "improvident" and was the cause of his injury, despite CBS' own testimony that Poller was an aggressive and alert operator who was highly successful. And, finally, it concluded that CBS did not desire to restrain competition, solely because it extracted from Poller a formal and meaningless representation that he would continue in business.

ARGUMENT.

I. CBS Used the Leverage of Its Network Power to Eliminate Poller and Bartell Through Cancellation of Affiliation and Acquisition, and Thereby Restrained Trade and Acquired Monopoly Power in Milwaukee.

A. The Network and Its Leverage Power.

Today the television industry is in a stage which closely resembles that of the motion picture industry before *United States v. Paramount Pictures*, 334 U. S. 131 (1948). Indeed, the concentration of control is much more pronounced in the television industry.

There are only three national networks. In 1955 when CBS acquired WOKY-TV the three networks controlled 69.9% of the national television advertising market. CBS' share alone was 33.4% and this was almost as much as NBC and ABC combined (36.6%). CBS and NBC together accounted for 62.1%. CBS alone controlled 46.5% of network time sales, exclusive of national spot sales, and CBS and NBC combined controlled 88% (R. 250). Moreover, of the fifty largest CBS television advertisers, 76% also advertise on at least one other television network and 58% are among the fifty largest customers of at least one other television network (R. 251). There is thus ample demand by advertisers to insure the continued co-existence of the three networks.

Each of the three networks uses only one local outlet for its programs. Since there are at least three stations in the vast majority of significant markets, competition between the networks for outlets for their programs is virtually non-existent. Instead, whatever competition exists is between the stations for affiliation with the network, for the national advertising dollars are almost entirely in the hands of the networks.

By this use of the coercive power of its programming CBS—and each of the other two networks—has accumulated what it calls a chain of affiliated stations. In granting the affiliation the network requires the station owner to become an "exclusive dealer". His continued existence is dependent on his supplier; if his affiliation or "dealership" is cancelled, the network product, without which he cannot compete, is taken from him.

Paralleling the motion picture industry's "block booking", the networks have solidified their position by the imposition of "must buy" and "option time".

"Must Buy".

CBS has a policy which requires that network advertisers *must buy* time on a *group* of stations designated by the network.[2] This is the minimum. Without it the advertiser can buy no time whatever. Colloquially and quite accurately the practice is known as "must buy" and the stations are called "must buy" stations.

The "must buy" requirement forces an advertiser to accept television coverage that he may not want in order to get the coverage he does want. It manifestly constitutes an illegal tie-in arrangement. *Northern Pacific Railway Co. v. United States*, 356 U. S. 1 (1958).

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2. Since this action was begun significant developments have occurred which would warrant a change to the past tense in the treatment of "must buy". On November 27, 1958, CBS announced to its affiliates that effective March 1, 1959, it would no longer pursue the "must buy" policy, but instead would require a "minimum buy" by which network advertisers would be obliged to contract for a minimum amount of *dollars* of advertising if they desired to have any network advertising at all (R. 245-46). On January 7, 1959, NBC also announced abandonment of its "must buy" policy effective March 15, 1959, and the institution of a "minimum buy" plan (R. 246). ABC has enforced a "minimum buy" for some time.

However, since the practice was still in effect at all times pertinent to this case, the present tense has been retained. It is not necessary at this time to determine the difference, if there is any, between "minimum buy" and "must buy".

"Option Time".

CBS is able to enforce its "must buy" requirement because of another practice, one which it imposes on its affiliates, known as "option time".

The "standard" affiliation contract between the network and its affiliates provides that, subject to certain conditions, the affiliate must accept and broadcast all programs offered to it by the network during designated hours of the broadcast day. The hours thus granted to the network are known as network "option time".[3] These are, of course, the most desirable segments of the station's broadcast time.

"Option time" is virtually identical to the "block booking" practices so severely condemned in *United States v. Paramount Pictures,* 334 U. S. 131, 156-57 (1948).[4] Indeed, "option time" is even more virulent than block booking. It not only commits the station in advance to take a whole block of programs, but also constitutes a combination or arrangement between the network and the affiliate to shut out the programs of possible competitors of the network.

These illegal "must buy" and "option time" practices do not, of course, by their mere existence, confer a cause of action on petitioner. They are, however, powerful evidence of deliberate practices by the network in the acquisition of additional power beyond that which is inherent in the nature of the network itself. For the broadcast of a network program inevitably results in a vertical monopolization of every station throughout the country which receives and transmits that program at the time it

3. The standard option time clause is contained in Poller's affiliation contract (R. 57-58).

4. The Department of Justice has notified the FCC, in response to the FCC's request for "a formal opinion of the Attorney General on the applicability of the antitrust laws to the option time practice", that "viewed either as an 'exclusive dealing' or 'tying' device, the Commission's own findings require the conclusion that option time runs afoul of the Sherman Act". 18 *Pike & Fischer, Radio Regulation,* 1801, 1809.

is broadcast. It results from the physical fact that a particular station can broadcast only one program at a time. The case here is no different from what it would be if because of physical law three concerns doing the same thing could each reach into only one of three separate areas of space. In a sense they would be competing with each other. But it is equally true that each of them would have exclusive control in the *entire* area that it could *possibly* embrace. It is no less control by any one merely because there is another outside area unapproachable by it, in which another likewise holds exclusive sway.

Thus CBS dominates the stations in its network. It has added to the inherent power it has over each station in its role as a network by its establishment of "must buy" and "option time" which it has embedded in its affiliation agreements. The affiliation agreements themselves keep the stations dangling on the good will of CBS by the standard provision for cancellation at the will of the network. So it is that each station which is part of the network, although in name independent, is completely at the mercy of CBS. The station must rely on CBS for its programs, its advertisers and its audience. And inevitably, it lives in fear of CBS' disfavor, which may result in the arbitrary cancellation of its affiliation, on which all has been made to depend.

B. The Network's Ownership and Operation of Stations Is the Ultimate Weapon in Its Control Over Its Affiliates.

The power of the network over its chain of affiliated stations is vastly increased by the network's ownership and operation of stations on the same level as its affiliates. So potent a weapon would be direct ownership of an entire network of stations that the FCC has forbidden ownership of more than a limited number by any one party.[5]

5. Section 3.636 of the FCC Regulations provides: ". . . The Commission, . . . will in any event consider that *there would be such a concentration of control contrary to the public interest,* con-

In doing this it has recognized that on the strict merits the bar might well be absolute and the networks forbidden to engage in any station operation.[6] Notwithstanding this limitation by the FCC, the evil of network ownership remains, because it exists as a *potential* threat against every station in the country.[7] To the fear of an affiliate that the network may cut off his affiliation, is now added the ultimate fear that the network may become a competing station operator and with its superior economic power easily crush the affiliated station. Moreover a network which purchased a station in competition with its affiliate would not permit the affiliation to continue (R. 168, 201). Acquisition of a station by the network inevitably, therefore, means cancellation of the local affiliation (R. 41).

It does not matter that the number of stations which the FCC will permit the network to own and operate is limited. For every affiliate lives in the shadow of the fear that the network may acquire a station in *his* market. It does not diminish the power of one who possesses a few atomic bombs that everyone he threatens knows that he cannot use the few bombs against all; for the universal fear to exist it is enough that he can use them against any one of those who are threatened.

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venience or necessity *for any party* or any of its stockholders, officers or directors *to have a direct or indirect interest in*, or be stockholders, officers, or directors of, *more than seven television broadcast stations*, no more than 5 of which may be in the VHF band". (Emphasis added.)

6. In the 1941 Report on Chain Broadcasting the FCC stated (at p. 67): "Assuming that the question were presented as an original matter at this time, the Commission might well reach the conclusion that the businesses of station operation and network operation should be entirely separated."

7. Salant, a Vice President of CBS, has acknowledged that the power of CBS to acquire stations had created a "risk" to affiliates to which obviously they would not be subject in the absence of that power (R. 221). He also recalled instances where affiliates expressed anxiety over CBS "buying in the market" of the affiliate at a time when CBS had not yet acquired the maximum number of stations (R. 221-22).

C. CBS Used the Leverage Power of Its Network to Acquire Poller's and Bartell's Stations and So Emerge in Sole Control of the UHF Market in Milwaukee.

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1. *UHF Is the Only Source for Expansion and Potential Competition in the Television Industry.*

No one can doubt that UHF offered—as it still does—the only hope for competition in television. As early as 1945 the FCC recognized the inadequacy of VHF channels to provide a nationwide competitive television system and declared the development of UHF to be essential to achieve that objective (R. 235-37).

Salant, Vice-President of CBS, admitted that it was necessary for UHF to grow and expand because:

> "VHF had grown and expanded about as far as it could and *we are bursting at the seams in this business.* Broadcasting has to find some place else to go and *the twelve VHF channels don't provide sufficient room for all the competition.*" (Emphasis added.) (R. 204)

With the failure of UHF only "trouble" could be envisaged:

> "As long as we don't have enough room to allow for more stations that the economy will support, there is going to be trouble because *there is some degree of artificial*—artificial in the sense of limitation of spectrum space, *artificial restriction on the normal growth that the industry could stand.*" (Emphasis added.) (R. 204-5)

It is undisputed, therefore, that the success of UHF is essential to restore competition in the television industry.

2. *Poller's Operation in Milwaukee Was the Prize Example of UHF's Prospect for Success.*

Against a background of mounting failures and forecasts of doom for UHF, CBS paid a deserved tribute to the unique and outstanding success achieved by Poller in Milwaukee.

In 1954 Dr. Stanton, CBS' President, testifying before the Potter Committee, made complimentary reference to Poller's WCAN-TV as an example of a "vigorously and aggressively managed new station" which was doing well.[8]

Salant described Poller thus:

> ". . . Lou Poller represented to me a new generation of broadcasters, the young, aggressive, alert guys that hadn't gotten to taking things for granted in pushing buttons. They were really doing a job." (R. 203)

He regarded Poller as "just the kind of guy who stood a chance of making a go at it" in an "intermixed" market (R. 204). This was because of "his aggressiveness, his alertness. He's a hard fighter" and a "man of ability" (R. 204).

Salant had only praise for Poller's equipment and facilities which later fell into CBS' hands. It had been "skillfully and economically acquired", and was "better and more" than that of Bartell, his competitor. Poller "had a much better, spanking clean studio, which is important to us", and he had "good, clean, first-rate equipment" (R. 226).

The praise which CBS thus lavished on Poller is shown to have been fully merited by the facts. Such extraordinary progress had been made that within six months after Mid-

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8. Poller Affidavit (R. 241). Hearings before the Subcommittee on Communications, Committee on Interstate and Foreign Commerce, United States Senate, 83rd Cong., 2d Sess., p. 975. See also Stanton's testimony that Van Volkenburg, President of CBS-TV, ". . . thought that Poller was a very promotion-minded, sales-minded, aggressive station operator" (R. 150-51).

west began broadcasting over 60% of the 260,000 television sets in the Milwaukee area were converted to UHF in order to be able to receive the programs of WCAN-TV. Public acceptance of WCAN-TV and UHF increased continuously and by October 1954 almost 90% of the television sets in Milwaukee had been converted (R. 15). Since conversion of VHF receiving sets to UHF involves an expense of $20 or more per set (R. 254) it is clear how strong the demand had become for UHF reception in the Milwaukee area.

Milwaukee thus was a "market of substantial size where UHF had a chance" to succeed (Salant, R. 187). It had a station operator who was able, alert, aggressive and promotion-minded enough to make it succeed.

It was this market which CBS determined to acquire for itself and bring under its sole control.

3. *CBS Used Its Power to Acquire Poller's Station and Monopolize UHF in Milwaukee.*

UHF was the only source of potential competition to CBS as a network, and it was in Milwaukee that UHF under Poller's management had achieved its outstanding success. It is precisely the Milwaukee market that CBS determined to enter, there to acquire exclusive control of UHF. This it did by acquiring a binding option on Bartell's franchise and then cancelling Poller's affiliation. Since Poller was dependent on the CBS affiliation, there fell into CBS' lap like a ripe fruit the new and modernized studio and facilities that Poller was at that very time constructing. Common sense compels the conclusion that the cancellation of Poller's affiliation and the acquisition of Bartell's franchise were one transaction. This common sense conclusion is specifically acknowledged to be correct by CBS itself.[9] It is equally clear that the notice of can-

9. From CBS' point of view these two events were part of the one transaction of going into Milwaukee (Stanton, R. 168; Salant, R. 201).

cellation of Poller's affiliation was given with the intention that CBS could then arrange to acquire Poller's equipment and studio at its own price, instead of the price of $2,000,000 it already had reason to believe Storer Broadcasting Co. was willing to pay. And at the same time, it would eliminate UHF competition in Milwaukee.

It would be strange enough, if CBS favored the growth of UHF, that it should invade Milwaukee, where UHF already was prospering under Poller, its own affiliate. It is stranger still that on deciding to invade Milwaukee CBS should ignore its affiliate, Poller, and instead should go to his competitor, Bartell, and negotiate for the purchase of Bartell's franchise. Even more remarkable is this because CBS knew that Poller had already been offered $2,000,000 by Storer for his station, whereas CBS had no indication whatever that Bartell intended to sell its station.[10] Moreover, CBS knew that Poller's station had the better equipment, whereas Bartell's equipment was useless to it.[11] *One searches the Record in vain for any satisfactory explanation by CBS of why it decided to acquire Bartell's station and leave Poller stranded and unaffiliated.* It has tendered an explanation. On its explanation CBS stands condemned. It claims that it has a policy never to buy a station from an affiliate except at the full price the affiliate first asks (R. 200-01, 279-80). CBS had heard indirectly (Stanton, R. 152) that Poller wanted "in excess of $2,000,000" for his station (Stanton, R. 179) and it was not ready to pay such a price (Stanton, R. 152, 164). For this reason, CBS claims, it never approached Poller, never negotiated with him, and never suggested a price it thought reasonable, even though he was its affiliate (Stanton, R. 153-54; Answer of Defendants to Interrogatory No. 3, R. 32). CBS explained that it established this extraordinary policy toward its affiliates because it feared that otherwise people would be "claiming that we were improperly using our affiliation

10. (R. 163-64, 178-79).
11. (R. 226).

to grind down . . . an individual's price", or "by telling a guy that if he didn't come down in price we'd go across the street and take the affiliation away from him, go across the street and buy" (Salant, R. 200).

To be affiliated with CBS, therefore, is *in CBS' own eyes* to be so inherently liable to be victimized by CBS that CBS fears to deal with the affiliate.[12] What more eloquent confession can there be that CBS enjoys monopolistic power? Here the confession is strengthened by the fact that CBS' conduct exactly parallels what it acknowledged to be improper: it refused to negotiate with its affiliate, but acquired the affiliate's assets after grinding down his price by going across the street and buying up his competitor and then taking his affiliation away from him. True, CBS did not utter words of threat to achieve the result; instead it let its coercive acts speak for it and garnered their benefits.[13]

Poller was powerless to avoid CBS' tactic of buying across the street to grind down his price. Neither of the other networks, NBC or ABC, was a rival for Poller's facilities;[14] and CBS had effectively discouraged outsiders like Storer from coming in by refusing on their request to give assurance that if they acquired Poller's station CBS would continue the affiliation.[15]

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12. Dr. Stanton was asked (R. 183-84): "Q. If you had wanted to acquire WCAN from Mr. Poller at a lower price than he demanded, wouldn't one of the elements which would depress the price have been your termination of his affiliation agreement?" He replied: "A. Yes, if we had chosen that course of action."

13. Salant's testimony provides the parallel:

"Q. Didn't you go across the street and buy a station and terminate his affiliation? A. We did indeed, but we didn't use it to bargain with Poller" (R. 201).

14. NBC already had an affiliation with WTMJ-TV, a VHF station. On August 24, 1954 it was announced that WTVW-TV, also a VHF station had become affiliated with ABC and would go on the air in October. It commenced broadcasting on the air in October. It commenced broadcasting on October 27, 1954 (R. 241-42).

15. (R. 26, 163-65, 178-79).

4. CBS Forced From Poller a Sham Agreement to Stay in Business.

The court below held that CBS did not intend to acquire exclusive control of the UHF market in Milwaukee (R. 297). It reached this conclusion by accepting CBS' claim that its benign intention was demonstrated by the words in the agreement of purchase that Poller would continue broadcasting even after CBS had taken over his equipment,—words which it must be obvious that CBS caused him to utter. CBS admits that this provision in the contract [16] was required by it (Stanton, R. 159; Salant, R. 222). It served no purpose of Poller's, but he had no bargaining power with CBS and had to acquiesce (R. 106, 224-25). And it must be remembered that Poller would never receive even the price CBS agreed to pay him for his studio and equipment unless and until the FCC approved of CBS' acquisition.[17] To obtain the proceeds of the agreement Poller, therefore, had to suppress any indignation or complaint; indeed he had to favor approval of CBS' action.

Is it possible seriously to believe that, having thrown himself on the mercy of CBS for some compensation out of the wreckage of his business and having gotten from it by Salant's intercession an agreement to pay him $500,000 plus the useless WOKY equipment for his facilities, Poller could dare refuse to sign what CBS required of him as an expression of his intention for the future? What a remarkable situation we have revealed when the purchaser of Bartell's station *insists* that Poller (who would be in competition with it) must promise that he will continue to

16. It is actually a recital in the agreement of November 12, 1954 in which CBS agreed to buy Poller's equipment and transfer to him the inferior Bartell equipment: "Whereas, Midwest has represented to CBS that Midwest intends to continue the operation of WCAN and all business incidental thereto and for that purpose CBS proposes to make the sale and transfers hereinafter set forth . . . ." (R. 61).

17. (R. 62).

operate his "competing" station. One need not be an uncloistered worldling to know why CBS insisted upon this provision. It was obviously written because of CBS' fear of the Sherman Act (R. 21), for it had no relevance to the contract of purchase of Poller's equipment. CBS denies that fear of the Sherman Act was in its mind; indeed it claims that it lives in innocence of the existence of the antitrust laws (R. 222). But the fear it felt is proclaimed loudly in the recital that Poller would continue in business even after it took away his equipment. This self-serving statement, obtained as it was as a result of CBS' coercive power, can serve no exculpatory purpose; instead it is strong proof of guilt. Nor do we believe that Poller is to be condemned because he acquiesced in an acknowledgment which both CBS and he knew had no reality. We freely admit that one who has the power to strip a man of his possessions will have no difficulty in also extracting from him an acknowledgment that the transfer was eminently agreeable to him.

5. *Poller Was Injured by CBS' Exercise of the Network Power It Had Acquired and Illegally Extended.*

The District Court, Holtzoff, J., assumed that the Sherman Act had been violated and a conspiracy had been shown, but nevertheless dismissed the petitioner's admitted injuries as *damnum absque injuria* because CBS had simply exercised two "rights": a contractual "right" to cancel petitioner's affiliation, and a legal "right" to choose to buy a station, albeit a rival station, which it now would operate itself (R. 282). The Court of Appeals came to a similar conclusion. Its main reason, however, was that petitioner was saved by CBS from a loss he was about to sustain because he had "improvidently" undertaken to expand his station facilities even though he knew that CBS had the right to terminate his affiliation (R. 294, 299-300).

The strange conclusion thus was reached that because Poller prospered and expanded while doing so, CBS' in-

jury to him is in some way to be excused, although it might not have been justifiable if he had not expanded. The Court of Appeals has excused the destruction of Poller's successful enterprise as if his prosperity was a kind of contributory negligence because it excited the cupidity of the network.

Of course, whether Poller expanded less or more cannot affect the question of causation, i.e., whether he was injured by the violation of the Sherman Act. The utmost effect it can have is in the determination of the amount of damage he suffered.

II. CBS Did Not Have an Unqualified "Right" to Cancel Poller's Affiliation and to Purchase Poller's Equipment and His Competitor's Station.

The court below, reading the agreement of affiliation in isolation from the surrounding circumstances, and invoking a kind of doctrine of estoppel by contract as a defense under the Sherman Act, held that any violation of Section 1 was excused because Poller accepted the agreement with its six months' cancellation provision. It extended *United States v. Colgate & Co.*, 250 U. S. 300 (1919), and held that what otherwise would have been a restraint of trade or monopolization was excused because CBS exercised its "rights",—an inherent "right" to buy Bartell's station instead of Poller's, and a contractual "right" to cancel Poller's affiliation (R. 295). It ignored the obvious effect of these acts *in combination*, even though CBS has admitted that they constitute one transaction (R. 168, 201).

The limits of the ever-recurring argument that a manufacturer or trader has the right to select his customer (*United States v. Colgate, supra*), were recently reviewed in *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960). Whatever may be the fullest reaches of *Colgate*, as explained in *Parke, Davis*, there is, of course, no "right", whether by contract or otherwise, to violate the antitrust law. As this

Court said in *Lorain Journal Co. v. United States,* 342 U. S. 143, 155 (1951):

> ". . . the word right is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified . . . . The right claimed by the publisher (to select its customers and to refuse to accept advertisements from whomever it pleases) is neither absolute nor exempt from regulation. *Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act* . . . ." (Emphasis added.)

Moreover, the *Colgate* rule does not even apply where a national network uses its leverage power as a network to enter into the business of operating a local TV station and thereby reduces competition and creates monopoly. In the motion picture cases this Court held that exhibitors could not use their power in non-competitive localities as levers to force distributors to grant them preferences in competitive localities: *Schine Chain Theaters v. United States,* 334 U. S. 110 (1948); *United States v. Griffith,* 334 U. S. 100 (1948).

In *United States v. General Motors,* 121 F. 2d 376 (7th Cir. 1941), GMC was held to have violated Section 1 of the Sherman Act because it used its monopoly power over the supply of its own automobiles and over the economic fate of its dealers, to compel them to use GMAC for the financing of automobiles.

In *Eastman-Kodak v. Southern Photo Materials Co.,* 273 U. S. 359 (1927), this Court held that Eastman-Kodak could not refuse to deal with the operator of a photographic stock house because he had refused to sell it his business, in consequence of which Eastman-Kodak opened its own retail outlet which it sought to make exclusive.

These cases make it clear that to use the dominant power possessed in one market to expand coercively in another market violates the antitrust law.

This case is not governed by *Packard Motor Car Company v. Webster Motor Car Company*, 243 F. 2d 418 (D. C. Cir. 1957),[18] on which the courts below relied. In *Packard*, the termination of the affiliation was held to be a simple exercise of a contract right only after a full examination of all the surrounding circumstances to ascertain the power position of the manufacturer and the economic effect of its action in the market. Here the court below erroneously extended its already controversial holding in the *Packard* case and exalted the contract right to a level that reduced the surrounding circumstances to immateriality. Here we are dealing with the dominant supplier rather than a weak competitor. In *Packard*, the manufacturer yielded to its powerful distributor which demanded the exclusive franchise. Here CBS yielded to no one and has favored no one—but itself. CBS did not select one rather than another "distributor" to carry on competition for it, as Packard did in Baltimore. On the contrary, CBS itself invaded the retail market by swallowing up the two independents and taking them over itself. Thus, by its own act two UHF stations were destroyed and CBS itself lamented that where there were two, there now was one.

The same situation as ours was presented in *United States v. Radio Corporation of America*, 358 U. S. 334 (1959). There the United States asserted that RCA and its wholly-owned subsidiary NBC had threatened to cancel the NBC network affiliations of certain Westinghouse-owned stations, unless Westinghouse agreed to exchange its Philadelphia TV station for one owned by NBC in Cleveland, plus cash. Under this threat the exchange was made and NBC was enabled to enter a new market area. The District Court granted summary judgment for RCA on the ground that

18. The *Packard* case followed *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. C. Md. 1956).

the United States was precluded by the FCC's approval of the challenged transaction. 158 F. Supp. 333 (E. D. Pa. 1958). This Court repudiated that defense and reinstated the complaint. Although this Court did not expressly characterize as illegal the actions of RCA, its reversal of the District Court would indicate that the complaint stated a cause of action.

The present case differs from *RCA* only in the absence of an open threat by CBS. But, of course, an overt threat goes only to the strength of the evidence, and if CBS' conduct in fact had an irresistibly coercive effect on Poller, its avoidance of an overt threat is of no significance. Indeed, Poller's claim is even stronger than Westinghouse's, since here, unlike that case, the result was to reduce TV competition in the market area involved. The economic fact is that CBS eliminated Poller the moment it bought Bartell and thus emerged as the sole UHF owner and operator in Milwaukee.

The court below also ignored the obvious restraining effect of CBS' conduct on the future development of the UHF spectrum. CBS monopolized UHF in Milwaukee and became the sole operator there. Where previously there had been two UHF stations, now there was but one. Where there had been two independently operated UHF stations, now there was none. By waiting until Poller and Bartell had established the feasibility of UHF in Milwaukee and then using its leverage power to wipe them out, CBS inevitably discouraged any independent operator from coming into Milwaukee to face competition with the giant network which had just revealed its power to eliminate independent operators. The field was now closed and CBS held exclusive control. But the result was even more far-reaching. As succinctly stated by Judge Washington in his dissenting opinion:

> ". . . by waiting for Poller and Bartell to develop the UHF market in Milwaukee and then using its

economic and contractual power to establish itself in Milwaukee in their stead, CBS must have seriously discouraged new UHF operations elsewhere, for few entrepreneurs would be willing to pioneer a new field only to have the fruits of success taken from them by a network, without compensation." (R. 304-5)

Not only did CBS now have exclusive control of UHF in Milwaukee, and not only did it thereby seriously discourage prospective UHF operators elsewhere. It now held in its hands the future fate of UHF everywhere. For in the words of Salant, if CBS decided to abandon the station it had now acquired, "it would be the *kiss of death to UHF*" (Emphasis added.) (R. 207).

III. CBS' Contract by Which It Became a Station Owner in Milwaukee Violates the Sherman Act.

CBS' acquisition of a station in the Milwaukee market by itself—and wholly aside from its illegal use against Poller of the leverage of its network power—constitutes an unreasonable restraint of trade.

When CBS entered the Milwaukee market it eliminated all local competition for its product. Whereas previously there existed the possibility of competition between independent stations in Milwaukee for the CBS affiliation, this now was taken over by CBS itself. There was automatically excluded from competition one-third of the network shows available in the Milwaukee market. Indeed, realistically the removal of CBS affiliation was the same as the removal of all affiliation possibilities, since the other two networks were already affiliated with preferred VHF stations.

Moreover, ownership by CBS of a station inevitably suppresses competition. It suppresses competition in the national spot advertising market, since network ownership of a station is incompatible with the national spot advertising, which is in direct competition with network advertis-

ing.[19] It also reduces competition because network ownership of stations in the major markets increases the network's power over national advertisers and strengthens its "must buy" imposition on them. Finally, it automatically removes the station from the area of possible competition by the other networks for its facilities, and even makes it substantially inaccessible to non-network programs.

Of course, a manufacturer has the right to use his own product in his own outlet so long as he does not use the advantage resulting from integration to restrain the competition of others or to monopolize. But no manufacturer has a right deliberately to acquire control of a particular market for his product when the purpose or necessary effect is to exclude others from an important segment of that market. *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948). The restraint on competition from such integration is particularly severe where, as here, there are only three networks, only a few stations can exist in any one competitive area, and a large investment is required for new entrants into the station operation business.

It is one thing to permit the development of a network with a chain of affiliated stations. But such expansion does not require that the network enter into competition with its own affiliates by invading the local broadcasting market. To do so is not to yield to the natural economic pressure for expansion; rather it is by calculated plan to tighten the network's already great power of control over all local broadcasting. It makes it ironical to speak of competition among local broadcasters in the acquisition of stations if for the choice stations they must compete, not with each other, but with their dominant supplier, the network itself.

This Court has consistently held that combinations vertically integrated to secure arbitrary market control violate the Sherman Act. *United States v. Paramount Pic-*

19. See Report and Order of FCC, October 30, 1959, Docket No. 12746, 24 Fed. Reg. 9003, 9006, holding incompatible and therefore improper the network practice of acting as agent for independent stations in the sale of national spot advertising while engaged in selling network advertising.

tures, 334 U. S. 131 (1948); *United States v. Lehigh Valley Railroad Co.*, 254 U. S. 255 (1920); *United States v. Reading Co.*, 253 U. S. 26 (1920).[20]

Television is the youngest and probably the most important medium of mass communication. Its enormous public influence was emphasized in the recent Presidential election. It is an industry, therefore, in which competition must be freely encouraged. Control of the airwaves should be distributed into as many independent hands as possible. Concentration of control of the industry strikes at the heart of a free society.

The practices already revealed in this case show how CBS' enormous concentration of economic power was built up. CBS' explanation of its unwillingness to negotiate with its own affiliate because of its fearsome power shows how the independent operator stands in relation to the network. To permit the three networks which control the entire industry today to invade the retail market is to increase the power they already have as network operators and render it absolute from top to bottom by vertical integration. The dangers which this inevitably creates require that there be an absolute bar against network ownership of any station.

CBS' contract of purchase of Bartell's station therefore violated the Sherman Act. It is this contract which set in motion the injury which CBS inflicted upon Poller. There is, therefore, no justification for the conclusion by the courts below that Poller's admitted loss was *damnum absque injuria*.

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20. As stated by this Court in *United States v. Yellow Cab Co.*, 332 U. S. 218, 227, 228 (1947), and restated in *United States v. Columbia Steel Co., supra* at 523: " 'Dominating power' over the cab operating companies 'was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control'. If that theory is borne out in this case by the evidence coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred."

IV. There Were Parties Legally Capable of Conspiracy With CBS.

(1) CBS-TV, an unincorporated division of CBS, is legally capable of conspiring with its parent. CBS-TV as an economic fact is no different from an incorporated subsidiary, long since held capable of conspiring with its parent.[21] CBS-TV was created by CBS to operate in an independent area of economic activity—television broadcasting—which for operational purposes may be deemed a separate industry, and basically CBS treats it no differently than any of its subsidiary corporations.[22]

Indeed, CBS-TV's independence has been recognized to such an extent that it was authorized to make contracts with corporate subsidiaries and others, *and even with other divisions* in its own name and on its own behalf (R. 45, 149).[23] Obviously, if the division can contract it can agree, and if it can agree it can conspire.

The Sherman Act is concerned with economic substance rather than technicalities of form. Where separate economic entities have been created and exist because they represent separate business activities they should be sub-

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21. *Timken Roller Bearing Co. v. United States*, 341 U. S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).

22. Each division has its own officers (R. 149, 192); the officers of both unincorporated "divisions" and incorporated "companies" are equally subject to the orders of the parent corporation (R. 193); both are equally subject to the direction of the Board of Directors (R. 193); subsidiary corporations have been changed into divisions and vice versa (R. 193); each division maintains a separate bank account, a separate table of organization, and separate accounts for payroll and accounting purposes (R. 149, 195); and CBS itself admitted that other than corporate form there are no differences between CBS divisions and subsidiary corporations (Salant, R. 195).

23. The separate identity and joint purpose of CBS-TV and CBS are effectively demonstrated by the roles each played in consummating the Milwaukee transaction. CBS caused CBS-TV—with whom Poller had made the affiliation agreement (R. 57)—to cancel it (R. 20, 223); the acquisition of Poller's equipment was then made by CBS (R. 61).

ject to the antitrust laws regardless of whether the lawyers who watchfully preside over them determine that they be corporate or unincorporated. *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). Especially is this true here, where respondents took the precaution to establish a separate corporation known as "Columbia Television, Inc." so that the name would be protected, but left it as an empty shell and developed the unincorporated division to carry on the substance of the television business (R. 143-44).

In opposition to this view, respondents rely on the dictum of Mr. Justice Jackson's dissenting opinion in *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 606 (1951). It is of profound significance that the *Timken* case was decided June 4, 1951, and that the unincorporated "divisional concept" was adopted by CBS immediately thereafter.[24] The inference as to why this was done was made explicit by Salant: it was done "largely for legal reasons" (R. 194).[25]

(2) As to Bartell, owner of the independent station, it was solely on Bartell's *ex parte* affidavit that the court below determined that it knew nothing of the CBS plan. Accordingly, the court concluded that Bartell did nothing more than sell its station. However, regardless of the impropriety of determining Bartell's mental state solely on the basis of its own affidavit, Bartell concededly knew before the option was exercised that CBS was the purchaser. Nevertheless, Bartell proceeded to consummate the deal

24. Dr. Stanton fixed the date of the divisional set-up in June of 1951 (R. 144). Mr. Salant also referred to establishment of the "divisional" concept "in 1951 or shortly thereafter" (R. 194). Memoranda implementing the procedure on appointment and authorization of division executives are dated August 8, 1951 (R. 230-34).

25. At the very least CBS-TV is an unincorporated "association" within the meaning of Section 7 of the Sherman Act, 26 Stat. 209, U. S. C. Title 15, § 7. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344, 392 (1922) (and cases cited therein); *United States v. Greater New York Live Poultry Chamber of Commerce*, 30 F. 2d 939 (S. D. N. Y. 1928).

with CBS and executed many documents to enable CBS to complete the acquisition; some of them privately with CBS and others for filing with the FCC.[26]

This surely constitutes a "contract, combination or conspiracy" even if Bartell, when it *entered* the scene, had been an innocent seller.[27]

(3) As to Holt, it is clear that his activities constituted an essential element in the respondents' plan and his success was prerequisite to the ultimate consummation of the illegal scheme.

Holt was no mere errand boy or broker, but a man of independent means and position.[28] His testimony reveals that he flew from Birmingham, Alabama, to CBS' office in New York immediately on their summons (R. 119, 122) and from there went at once to Milwaukee to do their bidding (R. 91). Secrecy masked his activity and the stealth bears every earmark of conspiracy. A military style code for names and security was invoked (R. 136-37). He was thoroughly briefed prior to his departure for Milwaukee at a meeting attended by top officials of CBS and CBS-TV (R. 119-20). "Strategy" was discussed (R. 139) and a detailed memorandum was delivered to him as the "field operator" by the head of CBS-TV's engineering department laying out the precise competitive situation in Milwaukee (R. 130, 141-42).

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26. FCC Form 314, Application for Consent to Assignment of Radio Broadcast Station Construction Permit or License, executed October 29, 1954; FCC Form 726, Consent to Voluntary Assignment of Radio Station Construction Permit, executed January 14, 1955; Bill of Sale, Assignment of FCC authorization, and other closing documents dated February 16, 1955 (Answer of Defendants to Interrogatory No. 4, R. 34).

27. *Calcutt v. Gerig*, 271 Fed. 220 (6th Cir. 1921); *Rudner v. United States*, 281 Fed. 516 (6th Cir. 1922); *United States v. Standard Oil Co.*, 152 Fed. 290, 295-96 (E. D. Mo. 1907).

28. Holt testified that he is in business as a management consultant to radio and television stations (R. 113) because of his experience in the operation and organization of such stations. He was formerly a chairman of the Federal Reserve Board (R. 114).

Holt knew that Poller had an affiliation agreement with CBS-TV, but he was indifferent to this (R. 128) even though he knew that it was a thing of value (R. 140) and that CBS would inevitably terminate it upon acquiring Bartell's station (R. 122). He knew from respondents' memorandum that NBC was already affiliated with the one existing VHF station and that NBC would not be interested in acquiring a UHF station. Thus, he knew that the cruel venture on which he was embarking would destroy Poller. He did not communicate with Poller nor did he negotiate for his station.[29] He went at once to see Bartell and, with an ease that is astonishing, quickly obtained an option.

Holt's deposition makes it clear that he was not a mere agent or employee but an independent contractor who owned a contingent remainder in some of the scraps of the conspiracy which would fall his way if the main conspirator decided at any time to alter its plan. Until he assigned the option he acted in the belief that he would be able to consummate the deal for himself if CBS decided not to take it over (R. 138).

Respondents would remove Holt from responsibility by asserting that since there were not appropriate parties who could conspire, there was no conspiracy which Holt could have *aided*. In our view, this argument is without support, because CBS-TV is an entity legally capable of conspiring. Moreover, as we have already indicated, Holt was an independent party and not an agent. He himself was a party to the conspiracy. He had met in CBS' office in New York when the whole plan for the acquisition of Bartell's station was planned. He is not charged with "aiding and abetting" a conspiracy by CBS with others.

29. This evidence raises the important question why Holt did not seek an option from Poller. The inference can be plainly drawn that he had been instructed not to approach Poller because CBS had planned that Poller's new studios and equipment then being built should fall into its hands like ripe fruit once it severed the branch by cancelling the affiliation and announcing that it had an option to acquire the only other station.

Rather, he is charged with *participating* in a conspiracy with CBS.[30]

(4) Finally, corporate officers can be members of a conspiracy with their corporation: see *Schine Chain Theaters v. United States*, 334 U. S. 110, 116 (1948); *United States v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947).[31]

V. CBS' Elimination of Poller and the Exclusive Position It Achieved in Milwaukee Constitute Attempted Monopolization and Monopolization.

CBS always had unchallenged power to eliminate Poller. After it gained control of the UHF market in Milwaukee, CBS had absolute power to exclude other independent UHF operators from that market. The facts make it clear that the other networks, having VHF affiliations, were not interested in UHF. The VHF allocations would not accommodate any additional stations. The only source for expansion in Milwaukee, therefore, was in UHF. Since CBS had complete control over this vast portion of the television spectrum in addition to its great network power, it obviously could manipulate advertising rates and easily foreclose entry by any independents into the UHF market in Milwaukee. Indeed, as a practical matter, what entrepreneur would risk making the heavy investment in a pioneer UHF station when faced with this integrated giant as a competitor? CBS, therefore, now had taken into its

30. The court below erroneously concluded that even if Bartell and Holt "combined with CBS to accomplish a common purpose, it does not seem to us that the purpose was to restrain trade or commerce" (R. 295). In his dissent, Judge Washington makes clear the two-fold error of the majority in this regard: "Whether or not CBS desired that result is a question of fact to be determined at a trial. In a case like the present, however, specific intent to restrain trade or monopolize may be unnecessary. See *United States v. Griffith*, 334 U. S. 100, 105 (1948)" (R. 304).

31. See also *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); *Interstate Circuit v. United States*, 306 U. S. 208 (1939).

complete control the operation and destiny of UHF in Milwaukee, and was in a position to exclude anyone else from the Milwaukee station market.

CBS' elimination of Poller and its power to exclude other competitors in Milwaukee not only is a clear instance of the *existence* of monopoly power, but also is an equally clear manifestation of the *exercise* of that power. *United States v. Griffith*, 334 U. S. 100, 107 (1948).

VI. Summary Judgment May Not Be Granted on a Choice Made From Conflicting Evidence.

A court may not grant summary judgment by making a choice from conflicting evidence. The standards for the application of summary judgment are plain. *Sartor v. Arkansas Natural Gas Corporation*, 321 U. S. 620 (1944). We believe their limits have been so seriously ignored in the present case that this Court in the exercise of its supervisory power should forbid such encroachment on the right of trial by jury.

Especially should summary judgment be kept within its proper confines in the case of an individual plaintiff who seeks redress for injuries done to him by violation of the antitrust law. The difficult burdens which such a plaintiff assumes are proverbial.[32] Corporate defendants, experienced in the application of the antitrust law, are not expected to leave telltale evidence of illegal conduct. A plaintiff who has been injured by them must interpose his own limited resources against their vast powers in an effort to obtain equal justice under the law. Here, where the subjective elements of motive and intent are so important, where the means of proof lie so much in the control of the defendants themselves and where much of the evidence must come from their reluctant testimony, it is especially important that a plaintiff should not be turned away by a credulous accept-

32. See *Loevinger, Private Action—The Strongest Pillar of Antitrust*, 3 Antitrust Bulletin 167 (1958).

ance of self-serving affidavits. No matter how slight the evidence of the plaintiff or how energetic the defendants' denial of wrongdoing may appear, if there is the slightest possibility that the plaintiff can make out a case, he should not be deprived of his right to trial by jury. Trial by lawyer-drawn affidavit [33] is no substitute.

Here the court below repeatedly accepted as true CBS' version of the facts. We mention a few striking instances.

(1) In referring to our contention that each of the three networks has a "vertical" monopoly, the court below states that we argue this "despite the *fact* they are *fiercely* competitive" (Emphasis added) (R. 297).

(2) The court below states that CBS "chose not to attempt to buy Poller's station because it considered the $2,000,000 price too high" (R. 292). This went to the decisive question why CBS, knowing that Poller's station was for sale, did not approach him, but instead bought Bartell's station and then took over Poller's equipment, thereby in the combined act eliminating both Poller and Bartell. CBS explained that its policy was never to buy a station from an affiliate except at the price the affiliate first asked (R. 200-1, 279-80), because otherwise people would be "claiming that we were improperly using our affiliation to grind down . . . an individual's price". It could grind down an individual's price, if it wanted to, according to Salant, its Vice President, "by telling a guy that if he didn't come down in price we'd go across the street and take the affiliation away from him, go across the street and buy" (R. 200). Clearly CBS' explanation alone is sufficient to submit to the jury the issue whether it did not buy or even negotiate for Poller's station because it wanted to grind down his price by going across the street and transferring its affiliation. The majority accepts CBS' argument without even mentioning its own evidence which destroys it.

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33. See Holt Deposition, R. 117.

(3) The majority opinion refers to Poller's statement that he would continue broadcasting in Milwaukee even after he had abandoned his expensive equipment to CBS as proving that CBS made no attempt to monopolize (R. 297). It states this as a fact, without even referring to the inherent circumstances of compulsion, or to the contrary evidence, such as the inadequacy of the Bartell equipment, the fact that his statement appears as a recital in the agreement in which CBS undertook to purchase his equipment, or the obvious fact that he could not survive without an affiliation, now in competition with CBS as a local operator, instead of Bartell.

(4) The majority declares: "His [Poller's] sale to CBS was not sought by the latter. On the contrary, CBS bought Poller's equipment only at his importunity . . . ." (R. 294). This is a recognition of the shadow instead of the substance of the event. Poller importuned CBS to take his equipment off his hands only after CBS, already having in its pocket an option to buy Bartell, telegraphed Poller that his affiliation was cancelled. His conduct was what CBS had every right to anticipate and, indeed, to rely on,—he flew at once to New York and begged for mercy. To equate Poller's supplication with an independent offer to sell, is to attribute the result of a conspiracy to the conscious plan of the victim rather than the conspirators. Indeed, CBS itself has not gone so far as the majority below. For Salant expressly declared that CBS agreed to buy Poller's equipment because he felt sorry for Poller after he complained that he had been left "stranded high and dry" by CBS.[34]

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34. Salant's testimony: "He [Poller] felt that we had let him down very badly. His argument was that he had spent a lot of money on equipment, studios, on building up his station as an affiliate of the CBS Television Network; that now we had gone elsewhere to buy a station and cancelled his affiliation. He was left stranded high and dry with something far beyond what he could possibly need. He felt that we had dealt with him very badly.

"Ambie is going to kill me for this. I felt sorry for him. I felt that while we had not acted improperly, no matter what the reasons

The majority opinion is completely silent on the function of a court in summary judgment cases. One reads the opinion as if it were the conclusion of a trial by a judge without a jury. It is only in Judge Washington's dissenting opinion that some of the contrary facts are set out and recognition is given to the test which should apply in reviewing the evidence on such a motion. And as Judge Washington said, the general rule "would seem particularly true where (as here) it is charged that the public has been deprived of maximum television service by a reduction of competition . . . ." (R. 305).

CONCLUSION.

It is therefore respectfully submitted that the summary judgment entered by the District Court and affirmed by the Court of Appeals should be reversed and the District Court should be ordered to proceed to trial on the merits.

Respectfully submitted,

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were, here was a guy that poured his heart and his soul and his money —and his wife, I remember, whom I had met working at the station, too, and she was an awfully nice lady . . . . It was not the sort of thing you enjoy nor appreciate" (R. 223-24).

APPENDIX A.

STATUTES INVOLVED.

Sherman Act.

"1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

"2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

"7. The word 'person', or 'persons', wherever used in Sections 1-7 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Clayton Act.

"4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."